Supreme Court of the United States

BOY SCOUTS OF AMERICA;
and SAN DIEGO-IMPERIAL COUNCIL,
BOY SCOUTS OF AMERICA,

Petitioners,

v.

LORI & LYNN BARNES-WALLACE;
MITCHELL BARNES-WALLACE;
MICHAEL & VALERIE BREEN;
and MAXWELL BREEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to leases from the City of San Diego, San Diego Boy Scouts built and operates a campground and an aquatic center for use by Scouts and the general public. There are no religious symbols at either facility. Plaintiffs have never visited either facility, but feel offended that the City leases public property to Boy Scouts. The district court found an Establishment Clause violation because the City's leases were not the result of a competitive bidding process. The Ninth Circuit held that Plaintiffs have standing to bring an Establishment Clause challenge based on feeling offended. The questions presented are:

1. Whether Plaintiffs have Article III standing to bring an Establishment Clause challenge to City leases of recreational facilities to the Boy Scouts when Plaintiffs have never visited the facilities and the facilities are available for use by the public and display no religious symbols.[1]

2. Whether Plaintiffs have Article III standing to bring an Establishment Clause challenge to City leases to the Boy Scouts where the violation found by the district court was the lack of competitive bidding and Plaintiffs are not potential bidders, but rather object to Boy Scouts being the lessee under any circumstance.

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1. This Court recently granted a petition for a writ of certiorari in *Salazar* v. *Buono*, 77 U.S.L.W. 3458 (U.S. Feb. 23, 2009) (No. 08-472), which raises a related question for review, as discussed below in Section D.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. **Petitioners Boy Scouts of America and San Diego-Imperial Council, Boy Scouts of America.** Boy Scouts of America and San Diego-Imperial Council, Boy Scouts of America (formerly known as Desert Pacific Council, Boy Scouts of America) are not-for-profit corporations without stockholders. The only affiliate of Boy Scouts of America is Learning for Life, a not-for-profit corporation. Boy Scouts of America charters as local Councils approximately 300 not-for-profit corporations such as San Diego-Imperial Council to support Boy Scouting and other programs in prescribed geographic regions.

2. **Respondents Barnes-Wallace and Breen.** Lori and Lynn Barnes-Wallace identify themselves as a lesbian couple and Mitchell Barnes-Wallace as their child. Michael and Valerie Breen identify themselves as an agnostic couple and Maxwell Breen as their child.

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CONSTITUTION AND STATUTES

Petitioners Boy Scouts of America and San Diego-Imperial Council, Boy Scouts of America ("San Diego Boy Scouts") (together "Boy Scouts") respectfully petition for a writ of certiorari to review the June 11, 2008 decision of the United States Court of Appeals for the Ninth Circuit on rehearing in this case.

OPINIONS BELOW

The decision of the Ninth Circuit on rehearing (18a–68a)[2] is reported at 530 F.3d 776 (9th Cir. 2008), and the order denying en banc review and the dissent of Judge O'Scannlain for himself and five other judges (1a–17a) are reported at 551 F.3d 891 (9th Cir. 2008). The Ninth Circuit's original decision (72a–104a) is reported at 471 F.3d 1038 (9th Cir. 2006). One of the district court's decisions (136a–193a) is reported at 275 F. Supp. 2d 1259 (S.D. Cal. 2003). Two other district court decisions (105a–135a, 194a–226a) are unreported.

JURISDICTION

The decision of the Ninth Circuit on rehearing was entered on July 11, 2008, and the order denying en banc review was entered on December 31, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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2. Numbers followed by "a" refer to pages in the bound Appendix submitted with this petition. "ER ___" refers to the fourteen-volume "Excerpts of Record" submitted to the Ninth Circuit by Plaintiffs on January 3, 2005. "SER ___" refers to the five-volume "Supplemental Excerpts of Record" submitted by Boy Scouts on February 14, 2005.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III of the Constitution limits the judicial power to deciding "Cases" and "Controversies." U.S. Const., art. III, § 2, cl. 1.

The First Amendment to the United States Constitution provides, in part, that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ; or the right of the people peaceably to assemble . . . .

U.S. Const., amend. I.

STATEMENT OF THE CASE

1. a. The City of San Diego leases a campground in Balboa Park and a half-acre aquatic center on Fiesta Island in Mission Bay Park to San Diego Boy Scouts. The lease of Camp Balboa to San Diego Boy Scouts is substantially similar to leases to Girl Scouts and Camp Fire of adjacent campgrounds in Balboa Park. (SER 24-26, 56-63, 152, 193-95, 431-36.) The Fiesta Island lease to San Diego Boy Scouts resulted from the recommendation of 42 youth-serving organizations to the City, and San Diego Boy Scouts thereafter built the aquatic center on Fiesta Island with $2.5 million of its own funds. (SER 215, 1047-49, 1051-52, 1065-79, 1082, 1084 ¶ 19, 1137-41.) Both Camp Balboa and the Youth Aquatic Center are open to the public on a first-come, first-served basis (SER 216 ¶ 11, 217 ¶ 18, 295 (118:16-

119:14), 307 (67:13-19), 317 (249:11-15), 617 (64:8-18)), and are used by the public extensively (SER 216 ¶ 13, 218 ¶ 19; ER 2266-96).

The City leased the two properties to San Diego Boy Scouts for entirely secular public purposes. The Balboa Park Master Plan reserves a corner of Balboa Park for youth camping, and Girl Scouts, Camp Fire, and Boy Scouts all have leased campgrounds there since the mid-1950s to provide "an area for the appreciation of nature and the opportunity for young person social interaction within an outdoor setting." (SER 51, 422.) The Fiesta Island lease was entered into at the request of virtually all of the youth-serving organizations in San Diego, which identified San Diego Boy Scouts as the agency best equipped to develop and manage the Youth Aquatic Center. (ER 3289-90; SER 216 ¶ 12, 1047-52, 1065-79, 1082, 1133, 1137-41.)

The City spends nothing on the properties leased to San Diego Boy Scouts. (SER 3 ¶ 9, 5 ¶ 17.) San Diego Boy Scouts administers the properties at no cost to the City, and the City is the beneficiary of the millions of dollars San Diego Boy Scouts have invested in improvements. (ER 732, 820; SER 215 ¶ 10; SER 1084 ¶ 19.)

Camp Balboa offers camping, swimming, archery, and meeting space to the public at nominal fees. (SER 217 ¶ 18.) The Youth Aquatic Center offers kayaks, canoes, sail and rowboats, and meeting space to youth groups at inexpensive rates. (SER 215-16 ¶¶ 10-11.)

b. Boy Scouts of America's mission is "to prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values of the Scout Oath and Law." (ER 1515.) While Boy Scouts includes boys of every faith and boys not affiliated with organized religion, a boy must promise to do his duty to God and be reverent by taking the Scout Oath[3] in order to be a Boy Scout. 530 F.3d 776, 780 (23a). Boy Scouts are "absolutely nonsectarian." (ER 1580, art. IX, § 1, cl. 1; SER 273 (227:1-6), 274 (230:20-231:1), 309 (75:7-8).) As Plaintiffs concede, "Boy Scouts of America is not a religious sect" and San Diego Boy Scouts "is not a house of worship like a church or synagogue." (ER 54 ¶ 185; *see* ER 2007 ¶ 185.) "There are no religious symbols either at Camp Balboa or at the Youth Aquatic Center." 530 F.3d at 782 (28a).

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3. The Scout Oath states:

> On my honor I will do my best
> To do my duty to God and my country
> and to obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,
> mentally awake, and morally straight.

(SER 745, 764.) The Scout Law provides that a Scout is

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

(SER 745.)

c. Plaintiffs Breen identify themselves as an agnostic couple and their minor child. 530 F.3d at 780 (24a). Plaintiffs Barnes-Wallace identify themselves as a lesbian couple and their minor child. *Id.* (24a). None of the Plaintiffs has ever sought to use the Youth Aquatic Center or Camp Balboa. *Id.* at 782 (29a). No individual has been discriminated against in violation of the leases. 275 F. Supp. 2d at 1282 (180a). Plaintiffs object to the leases based on what they "feel" and "believe" about Boy Scouts (ER 84-85, 369-71) and sued to require the City to lease to another nonprofit that is more acceptable to them (*see* SER 241 (75:7-24); 234 (55:17-21); 252 (36:14-20); 247-49 (98:5-106:22)).

2. a. Plaintiffs alleged that the leases violate the Establishment Clauses of the U.S. and California Constitutions, the "No Preference" Clause of the California Constitution, the Equal Protection Clauses of the U.S. and California Constitutions, the "No Aid" Clause of the California Constitution, and California common law. (ER 602-04.) Plaintiffs requested that the district court "declare that defendants' leases of public parkland" violate federal and state law and "issue a permanent injunction" prohibiting the City from leasing to San Diego Boy Scouts. (ER 604.)

b. On April 13, 2001, the district court denied motions for summary judgment based on Plaintiffs' lack of standing. (206a.) While the district court held that "Plaintiffs' refusal to use the public parklands prevents them from establishing a direct injury in fact,'" (206a (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)), the district court concluded that Plaintiffs had alleged enough to proceed beyond the earliest

stages of the case based on standing as municipal taxpayers (216a).

c. When the case reached the summary judgment stage, the district court ignored undisputed evidence showing that no municipal taxes were involved, because under the leases San Diego Boy Scouts subsidized the City rather than the City subsidizing Boy Scouts. The district court did not address standing as municipal taxpayers or any other basis of standing.

The district court held that because Boy Scouts' private speech requires that members promise to do their duty to God, the City established religion by negotiating the Camp Balboa lease exclusively with San Diego Boy Scouts. 275 F. Supp. 2d at 1273-76 (165a). Even though the process followed was public and entirely typical, *see id.* at 1274-75 (164a) (citing Griffith Dep. at 92-94 (ER 844-45)), and even though the City selected San Diego Boy Scouts because it "alone is best suited to fulfill the City's needs with respect to the parkland," *id.* at 1287 (191a), the district court held that exclusive negotiations with San Diego Boy Scouts were not neutral because, by definition, they were not equally open to "the religious, areligious and irreligious," *id.* at 1275 (165a).

Thereafter, on April 12, 2004, the district court granted Plaintiffs summary judgment as to the Fiesta Island lease, relying on its decision regarding the Camp Balboa lease. (106a.) The district court concluded that the lack of competitive bidding was necessarily an Establishment Clause violation. (ER 3741; *see id.* ER 3738.)

3. a. A majority of a court of appeals panel concluded that Plaintiffs had federal standing and certified three questions of California law to the California Supreme Court on December 18, 2006. 471 F.3d at 1041, 1044-45 (75a, 82a-85a). With respect to standing, the majority rejected Plaintiffs' psychological injury claim, holding that Plaintiffs'

> purposeful avoidance of the parklands leased by the Boy Scouts as a protest against the Scouts' exclusionary policies is not a sufficient injury. We have held that people can suffer a direct injury from the need to avoid large religious displays, such as giant crosses or lifesize biblical scenes. . . . But there are no displays in either Camp Balboa or the Aquatic Center that would be so overwhelmingly offensive that families who do not share the Scouts' religious views must avoid them.

Id. at 1045 (85a-86a). The majority also concluded that Plaintiffs do not have standing as municipal taxpayers because there is no evidence that tax dollars support the leased property or that, if the leases were invalidated, the City would use the land to generate revenue. *See* 471 F.3d at 1046 (86a-87a). Nevertheless, the majority concluded that Plaintiffs had standing because they were denied equal access to Camp Balboa and the Youth Aquatic Center, *see id.* at 1044-45, in spite of undisputed facts of record to the contrary (ΣΕR 216 ¶ 11, 216 ¶ 13, 217 ¶ 18, 218 ¶ 19 295 (118:16-119:14), 307 (67:13-19), 317 (249:11-15)).

b. Judge Kleinfeld dissented from the majority's standing decision, arguing that the case should be dismissed because Plaintiffs allege no injury "beyond the offense to their sentiments." 471 F.3d at 1049 (95a-96a).

c. Boy Scouts sought panel rehearing and en banc review because, among other reasons, the summary judgment record precluded the conclusion that Plaintiffs were denied equal access and that there was thus no basis for standing.

4. a. The panel granted Boy Scouts' petition for rehearing in its June 11, 2008 decision. The majority reversed itself and adopted the standing theory it had initially rejected. It concluded that Plaintiffs had injury-in-fact by being "offended" at Boy Scouts' traditional values, having "aversion to the facilities," and feeling "unwelcome there." 530 F.3d at 783, 784 (29a). Plaintiffs avoided property leased to San Diego Boy Scouts "because they object to the Boy Scouts' presence on, and control of, the land: They do not want to view signs posted by the Boy Scouts or interact with the Boy Scouts' representatives in order to gain access to the facilities." *Id.* at 784 (33a). The majority now relied on the cases involving gigantic crosses on public land that it had distinguished in its previous decision. *Id.* (33a).

b. In dissent, Judge Kleinfeld pointed out that the theory of standing accepted by the majority conflicts with the Supreme Court's requirement that there be a concrete injury rather than merely personal dissatisfaction. *Id.* at 794-95 (60a). He described

the majority's new theory of standing as both unprecedented and a threat to the First Amendment:

> By treating the Barnes-Wallaces and Breens revulsion for Boy Scouts and consequent avoidance of a place the Boy Scouts manage as conferring standing, we extend standing to a claim that precedent does not support. And we assist in a campaign to destroy by litigation an association of people because of their viewpoints. A feeling of revulsion for others who have different beliefs, so strong that one feels degraded or excluded if they are present, does not confer standing.

530 F.3d at 798 (67a). Judge Kleinfeld concluded that the majority's reliance on gigantic cross cases ignored the "distinction between a prominent display of an unambiguous religious symbol on public land and groups with myriad viewpoints working with government to facilitate public use of lands." *Id.* at 798 (65a).

c. Boy Scouts sought en banc review, arguing that the majority's standing decision was inconsistent with *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), and precedent from other courts of appeals.

5. The court of appeals denied en banc review on December 31, 2008. 551 F.3d 891, 892 (2a-3a). In a dissent joined by five other judges, Judge O'Scannlain concluded that "the three-judge panel majority's unprecedented theory creates a new legal landscape in which almost anyone who is almost offended by almost

anything has standing to air his or her displeasure in court." *Id.* (3a-4a). This theory "contradicts nearly three decades of the Supreme Court's standing jurisprudence" and has not been accepted by any other circuit. *Id.* (3a-4a). "Henceforth, a plaintiff who claims to feel offended by the mere thought of associating with people who hold different views has suffered a legally cognizable injury-in-fact." *Id.* (3a).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision on standing is in conflict with the standing decisions of other courts of appeals and with this Court's decision in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), and other standing cases. The Ninth Circuit's new theory of standing — no more than "armchair" standing — would be a radical extension of standing jurisprudence, opening the courthouse doors to anyone claiming to be offended by any government action under the Establishment Clause.

As this Court recently underscored, "[n]o principle is more fundamental to the judiciary's proper role in our federal system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341-42 (2006) (brackets in original) (quoting *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997)). Standing requirements ensure that judicial review "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond* v. *Charles*, 476 U.S. 54, 62

(1986) (quoting *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973)).

This limitation is applied particularly rigorously in Establishment Clause cases, where standing cannot be based on mere disagreement with the government's action but rather exists only if a plaintiff can demonstrate the specific expenditure of actual taxpayer funds in support of religion, *see, e.g.*, *Flast* v. *Cohen*, 392 U.S. 83, 1102-03 (1968), or direct exposure to unquestionably religious expression by the government, such as the display of giant crosses on public land, *see, e.g.*, *ACLU of Illinois* v. *City of St. Charles*, 794 F.2d 265, 267-68 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986). The basis for the strict application of the constitutional standing requirements in the Establishment Clause context is that unnecessary governmental intervention in religious matters can itself endanger religious freedom. *See Van Orden* v. *Perry*, 545 U.S. 677, 683, 699 (2005); *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819, 845-46 (1995) (warning against the "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires").

A. The Ninth Circuit's Decision Conflicts With the Standing Decisions of Other Courts of Appeals

The Ninth Circuit's decision is in conflict with the decisions of other courts of appeals, which follow *Valley Forge* and reject "armchair" standing based on feeling offended by some government conduct. As Judge O'Scannlain wrote for five other Ninth Circuit judges,

"[n]o other circuit has embraced this remarkable innovation," according to which "almost anyone who is almost offended by almost anything has standing to air his or her displeasure in court." 551 F.3d at 892 (3a-4a).

In *Valley Forge*, this Court held that "psychological consequence[s] . . . produced by observation of conduct with which one disagrees" is not enough for Article III standing. 454 U.S. at 485. The Third, Fifth, and D.C. Circuits have all followed this Court's precedent in *Valley Forge* to deny standing based on feeling offended, even where the plaintiff was confronted by the government's religious display or prayer.

In *ACLU of New Jersey* v. *Township of Wall*, 246 F.3d 258 (3d Cir. 2001), the Third Circuit declined to confer standing on plaintiffs challenging a holiday crèche display. One of the plaintiffs had never even seen the disputed crèche, and plaintiffs provided no evidence of their reaction to the religious display at issue. *Id.* at 266. The Third Circuit assumed that the plaintiffs "disagreed" with the display, but could not assume that they "suffered the type of injury that would confer standing." *Id.*

Following then-Judge Alito's reasoning from *Township of Wall*, the Fifth Circuit in *Doe* v. *Tangipahoa Parish School Board*, 494 F.3d 494 (5th Cir. 2007) (en banc), held that the plaintiffs had no standing to challenge the local school board practice of praying at meetings. As in *Township of Wall*, there was no proof that any of the plaintiffs had "ever attended a school board session at which a prayer like those challenged here was recited." *Id.* at 498. In addition, there was no

connection between the allegedly unconstitutional activity and the meetings that the plaintiffs did attend. *Id.* at 498-99. While the Fifth Circuit could assume that the plaintiffs were "offended" by an invocation at a school board meeting, that assumption was not enough to confer standing. *Id.* at 499.

The D.C. Circuit's recent decision in *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3507 (U.S. Feb. 13, 2009) (No. 08-1057), further shows that the Ninth Circuit's decision is at odds with other courts of appeals. In *Chaplaincy*, a group of Protestant Navy chaplains claimed "injury-in-fact from their being subjected to the 'message' of religious preference conveyed by the Navy's allegedly preferential retirement program for Catholic chaplains." *Id.* at 763. The D.C. Circuit held that plaintiffs who merely have "abstract offense" at the message conveyed by government action "have not shown injury-in-fact to bring an Establishment Clause claim, at least outside the distinct context of the religious display and prayer cases." *Id.* at 763, 764-65. The court concluded that the expansion of the religious display and prayer cases to cover standing for mere offense would be "quite radical." *Id.* at 765.

> Plaintiffs' argument would extend the religious display and prayer cases in a significant and unprecedented manner and eviscerate well-settled standing limitations. Under plaintiffs' theory, every government *action* that allegedly violates the Establishment Clause could be re-characterized as a governmental *message*

> promoting religion. And therefore everyone who becomes aware of the 'message' would have standing to sue.

Id. at 764.[4]

Other courts of appeals have found standing only where there were confrontations with overtly religious displays or prayers. *See Suhre* v. *Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) (a plaintiff must show "unwelcome direct contact with a religious display that appears to be endorsed by the state"); *see also ACLU of Ohio Foundation, Inc.* v. *Ashbrook*, 375 F.3d 484, 489-90 (6th Cir. 2004) (poster of the Ten Commandments in a courtroom), *cert. denied*, 545 U.S. 1152 (2005); *ACLU Nebraska Foundation* v. *City of Plattsmouth*, 358 F.3d 1020, 1027-30 (8th Cir. 2004) (five-foot-tall Ten Commandments display in a public park), *rev'd en banc on other grounds*, 419 F.3d 772 (8th Cir. 2005); *Glassroth* v. *Moore*, 335 F.3d 1282, 1292-93 (11th Cir.) (two-and-one-half ton monument to the Ten Commandments in

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4. The panel majority's decision is even in conflict with a recent Ninth Circuit decision. In *Caldwell* v. *Caldwell*, 545 F.3d 1126 (9th Cir. 2008), *cert. denied*, 77 U.S.L.W. 3413 (U.S. Mar. 23, 2009) (No. 08-858), a religious plaintiff filed an Establishment Clause claim arising out of her feeling offended by the discussion of religious views on the "Understanding Evolution" website created and maintained by the University of California and funded in part by the National Science Foundation. 545 F.3d at 1128. The Ninth Circuit held that the plaintiff's feeling offended "is no more than an 'abstract objection' to how the University's website presents the subject," so "there is too slight a connection between Caldwell's generalized grievance, and the government conduct about which she complains, to sustain her standing to proceed." *Id.*

the Alabama State Judicial Building), *cert. denied*, 540 U.S. 1000 (2003); *Murray* v. *City of Austin*, 947 F.2d 147, 150, 151-52 (5th Cir. 1991) (Christian cross in city insignia), *cert. denied*, 505 U.S. 1219 (1992); *Foremaster* v. *City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990); *ACLU of Illinois* v. *City of St. Charles*, 794 F.2d 265, 267-68 (7th Cir.) (Christian cross in a public Christmas display), *cert. denied*, 479 U.S. 961 (1986).[5]

The Ninth Circuit's holding here is a radical expansion of standing far beyond the limits heretofore observed in other courts of appeals. Plaintiffs have pointed to no evidence that they would be exposed to religious conduct or content when using the properties. If Plaintiffs were to come in contact with persons affiliated in some way with Boy Scouts while camping or kayaking, such interaction would not constitute "contact with religious *views* to which they are unable to subscribe." *Suhre*, 131 F.3d at 1087 (emphasis added).

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5. As the panel majority itself observes, "[o]ur Establishment Clause cases have recognized an injury-in-fact when *a religious display* causes an individual such distress that she can no longer enjoy the land on which the display is situated." 530 F.3d at 784 (33a) (emphasis added). The cases relied on by the panel majority — *Buono* v. *Norton*, 371 F.3d 543, 549 (9th Cir. 2004) (five to eight-foot tall cross), and *Ellis* v. *City of La Mesa*, 990 F.2d 1518, 1520-21 (9th Cir. 1993) (36-foot and 43-foot crosses), *cert. denied*, 512 U.S. 1220 (1994) — involved large crosses that the plaintiffs could not avoid when they attempted to use the public land in question. *See also Separation of Church and State Committee* v. *City of Eugene*, 93 F.3d 617, 619 n.2 (9th Cir. 1996) (plaintiffs "have standing to bring this challenge because they alleged that *the [51-foot] cross* prevented them from freely using the area") (emphasis added).

Nevertheless, the court of appeals found standing based on Plaintiffs having to "interact with the Boy Scouts' representatives" 530 F.3d at 784 (33a), which reduces the Boy Scouts and their representatives into walking shrines, whose mere presence Plaintiffs claim to find offensive, *see id.* at 785 n.5 (36a) ("The injury . . . is the offensiveness of having to deal with the Boy Scouts in order to use park facilities."). On this reasoning, Plaintiffs would have standing if the City employed an Orthodox Jew or a Muslim as a park ranger in charge of reserving places at the campground. As Judge Kleinfeld aptly observed, "[a] gigantic cross on a mountaintop carries religious significance that a herd of 11 year old boys camping out and swimming does not." *Id.* at 797 (63a).

B. The Ninth Circuit's Decision Conflicts With This Court's Decisions in *Valley Forge* and Other Standing Cases

1. Plaintiffs Do Not Have Standing Simply Because They Feel Offended

The Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. This Court has long held that merely feeling offended by government action does not give rise to standing to sue. *See Allen* v. *Wright*, 468 U.S. 737, 752-55 (1984); *Valley Forge*, 454 U.S. at 473; *see also Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 575-76 (1992). To permit standing based on personal offense would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders," *Allen*, 468 U.S. at 756 (citation omitted), or a "a judicial version of college debating forums," *Valley Forge*, 454 U.S. at 473.

This Court's holding in *Valley Forge* should have been dispositive in this case at its outset eight years ago. In *Valley Forge*, the federal government had given to the Valley Forge Christian College, free of charge, a 77-acre tract of land appraised at $577,500. 454 U.S. at 467-68. The deed required the college to use the property for 30 years solely for a school that met the accrediting standards of the State of Pennsylvania, The American Association of Bible Colleges, the Division of Education of the General Council of the Assemblies of God, and the Veterans Administration. *Id.* at 468. The college, which required its faculty to be "baptized in the Holy Spirit" and to live "Christian lives" and its administrators to be affiliated with the Assemblies of God, planned to use the property to expand its training of "'men and women for Christian service as either ministers or laymen.'" *Id.* at 468-69 (citation omitted).

The Third Circuit found standing based on a violation of the plaintiffs' constitutional right to be free from government establishment of religion. *See id.* at 482-83. This Court reversed, noting that Article III of the Constitution

> requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.

454 U.S. at 472 (internal quotations and citations omitted). The plaintiffs in *Valley Forge*, however,

> fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Id. at 485-86 (emphasis in original).

Here, while the panel majority stated that Plaintiffs suffered "both personal emotional harm and the loss of recreational enjoyment" 530 F.3d at 785 (35a), the fundamental basis of standing asserted is Plaintiffs' "emotional harm" or feeling "offended" because San Diego Boy Scouts is the lessee. Any "concrete recreational loss" is the result of Plaintiffs' purported emotional harm: Plaintiffs choose not to use the park facilities, which indisputably are open to them. *Id.* at 784 (34a-35a). As Judge Kleinfeld observed, "in our case there is nothing but avoidance of a place because of people there who hold different views." *Id.* at 795 (60a).

Plaintiffs claim to be offended because of "Boy Scouts' control of access to the facilities." *Id.* at 784 (32a). The panel majority concedes that the record reflects that both properties are operated on a first-come, first-served basis, that no one has ever been turned away from either property, and that Plaintiffs have not been excluded from the properties. *Id.* at 782-83 (28a-29a). As Judge Kleinfeld noted, while Plaintiffs

"may feel 'degraded' or 'offended' because of the Boy Scouts' positions on reverence and sexuality[,] so long as their access is unimpaired, the feeling is no stronger a basis for standing than the feelings others may have about atheists or lesbians managing the facility." *Id.* at 798 (67a). Plaintiffs' disapproval of Boy Scouts and of the City's decision to allow Boy Scouts to manage the properties open to all is precisely the type of psychological injury rejected in *Valley Forge*. 454 U.S. at 485.

Although Plaintiffs here do not allege exposure to any religious object or display, the panel majority nevertheless analyzes standing as though the fact of San Diego Boy Scouts' lease of the property itself were a religious display. The panel majority relies on Boy Scout "symbols of its presence and dominion." 530 F.3d at 784 (32a). But the majority concedes "[t]here are no religious symbols either at Camp Balboa or at the Youth Aquatic Center." *Id.* at 782 (28a). In the absence of any large crucifix, menorah, or statue of Jesus, the panel majority points to "signs posted by the Boy Scouts." *Id.* at 784 (33a). The only such sign is the Scout badge, which features an eagle and a shield with the stars and stripes against a *fleur-de-lis*. It is substantially similar to the official seal of the district court below (SER 746; ER 3717 ¶ 57) and other federal courts. None of them is a religious symbol.

2. Plaintiffs' Claimed Injury Is Not a Consequence of the Alleged Constitutional Violation

To have standing, Plaintiffs must demonstrate a concrete injury-in-fact and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 43 (1976)). Here, the court of appeals' theory of "armchair" standing is not based on any injury that the Breen Plaintiffs suffered "as a consequence of" the City of San Diego's alleged constitutional violation or that could be redressed by correction of that violation.[6] *Valley Forge*, 454 U.S. at 485; *see Lujan*, 504 U.S. at 560 ("there must be a causal connection between the injury and the conduct complained of").

The constitutional violation found by the district court was the City's lack of a competitive bidding process in awarding the leases. (170a-171a). Curing the alleged constitutional violation would not redress Plaintiffs' claimed injury. The undisputed evidence establishes

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6. On any theory, the other set of Plaintiffs, the Barnes-Wallaces, lack standing to pursue the religion clause claims. The Barnes-Wallace are pursuing claims under the Establishment Clause and similar California religion clauses based on claims that they are offended by Boy Scouts' views of homosexual conduct. None of the religion clauses says anything about such conduct, and the declaration from the Barnes-Wallaces on which the panel majority relies says nothing about objections to anything religious. Where a plaintiff's injury is of an entirely different origin from the alleged violation, surely it is not "fairly traceable" to the alleged legal violation as required under *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

that, due to the restrictions imposed on the potential uses of the parkland at issue, the City would seek a nonprofit group to operate Camp Balboa and the Fiesta Island site on similar terms, even if the current leases with Boy Scouts were voided. (SER 4 ¶ 12, 8 ¶ 24.) Further, it is undisputed that the only other major national youth camping organizations, Girl Scouts and Camp Fire, already are lessees in Balboa Park (having obtained their leases through a process identical to that which led to the Boy Scouts lease of Camp Balboa) (SER 24-26, 56-63, 152, 193-95, 431-36), and that Boy Scouts was selected as the organization best equipped to lease and operate the Fiesta Island site by 42 youth-serving organizations in San Diego (SER 215, 1047-49, 1051-52, 1065-79, 1082, 1137-41).

A competitive bidding process would not exclude the possibility — indeed high probability — that San Diego Boy Scouts would be the winning bidder in the end. As a result, competitive bidding would not redress Plaintiffs' "injury." Plaintiffs are not would-be competing bidders excluded by the City's decision to lease to San Diego Boy Scouts. Instead, Plaintiffs are merely offended by Boy Scouts as the lessee, not by the process by which San Diego Boy Scouts became the lessee. Their "armchair" objection to San Diego Boy Scouts leasing the properties for use by the public is not a concrete and redressable injury they have suffered but a wholly ideological and abstract objection that would exist regardless of the leasing process. Thus, Plaintiffs' purported injury is not a consequence of the alleged constitutional error, and curing the supposed Establishment Clause violation cannot redress their alleged injury.

C. The Ninth Circuit's Decision Opens the Floodgates to the Courts for Establishment Clause Litigation

The Ninth Circuit's decision eliminates any meaningful limits on standing to bring an Establishment Clause challenge. Prisoners have a new Section 1983 claim if they object to the presence of a prison chapel that they steadfastly avoid. Every would-be litigant can now sue for denial of access to the courts on Establishment Clause grounds if he or she claims to avoid the courts because there are images of Moses and the Ten Commandments there. Mr. Newdow now has standing to proceed with an Establishment Clause challenge to the Pledge of Allegiance if he claims to avoid government property where the Pledge is recited.

These are not far-fetched examples. The court of appeals' decision is already being followed as precedent to expand standing. Another district court in San Diego permitted Jewish War Veterans and several individuals to challenge Congress' acquisition of the land surrounding the Mt. Soledad cross and the presence of the cross on federal property as violations of the Establishment Clause. *Trunk* v. *City of San Diego*, 568 F. Supp. 2d 1199, 1202, 1204-05 (S.D. Cal. 2008). Plaintiffs based their standing to bring the suit on their feeling offended at the presence of the cross in a war memorial. *See id.* at 1204-05.

> If Plaintiffs' claims were based on any theory other than violation of the Establishment Clause, they would likely be out of court for lack of standing. . . . In the Ninth Circuit,

> however, merely being ideologically offended, and therefore reluctant to visit public land where a perceived Establishment Clause violation is occurring, suffices to establish "injury in fact."

Id. at 1205 (citing *Barnes-Wallace*).

D. This Case Should Be Decided with *Salazar* v. *Buono*

The Court recently granted a petition for a writ of certiorari to review another Establishment Clause standing decision from the Ninth Circuit, *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar* v. *Buono*, 77 U.S.L.W. 3458 (U.S. Feb. 23, 2009) (No. 08-472). The first question presented in *Buono* involves whether the plaintiff there has standing to maintain an Establishment Clause action based on his assertion that he is offended at the display of a cross on public land:

> Whether respondent has standing to maintain this action where he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

This question is similar to the first question presented by this petition, and any decision in *Buono* will be instructive in resolving the issues presented here. This

case is nonetheless worthy of the Court's review to ensure a broader factual context within which to consider and rule upon the common questions. In the alternative, the Court may wish to hold this petition pending its decision in *Buono*.

The Ninth Circuit's standing decision here relies heavily upon the Ninth Circuit's earlier decision in the *Buono* litigation, *Buono* v. *Norton*, 371 F.3d 543 (9th Cir. 2004). *See* 530 F.3d 776, 784, 786 n.6 (9th Cir. 2008). There are differences between the standing issue in *Buono* and the questions presented here that support granting this petition. *Buono* involves a large cross while there are no religious symbols on the properties at issue in this case. Similarly, the first question presented in *Buono* indicates that the plaintiff there has no objection to the public display of a cross but is offended that other symbols are not also displayed on the public land. Here there are no religious symbols or displays but only Plaintiffs feeling offended by the City's decision to lease to Boy Scouts under any circumstances.

These differing factual scenarios provide the Court the opportunity to provide more comprehensive guidance to the lower courts on an important issue of federal law. As a result, this petition should be granted and, if the Court believes it more efficient, the case argued in tandem with *Buono*. In the alternative, given the similarities between the two cases and the fact that the panel majority below relied heavily upon the Ninth Circuit's earlier *Buono* decision, the Court may wish to hold the petition pending its decision in *Buono*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2009